

OCT 29 1991

IN THE
Supreme Court of the United States OF THE CLERK

OCTOBER TERM, 1991

ALTRAN CORPORATION,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM IN SUPPORT

JOHN J. GIBBONS
CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
1 Riverfront Plaza
Newark, New Jersey 07102
(201) 596-4500

THEODORE V. WELLS, JR.
DAVID L. HARRIS
LOWENSTEIN, SANDLER,
KOHL, FISHER & BOYLAN
A Professional Corporation
65 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-8700

JONATHAN M. HYMAN
27 Fairfield Street
Montclair, New Jersey 07042
(201) 648-5687

Attorneys for Petitioner Altran Corp.

STEPHEN E. FELDMAN
KENNETH FELDMAN
Of Counsel

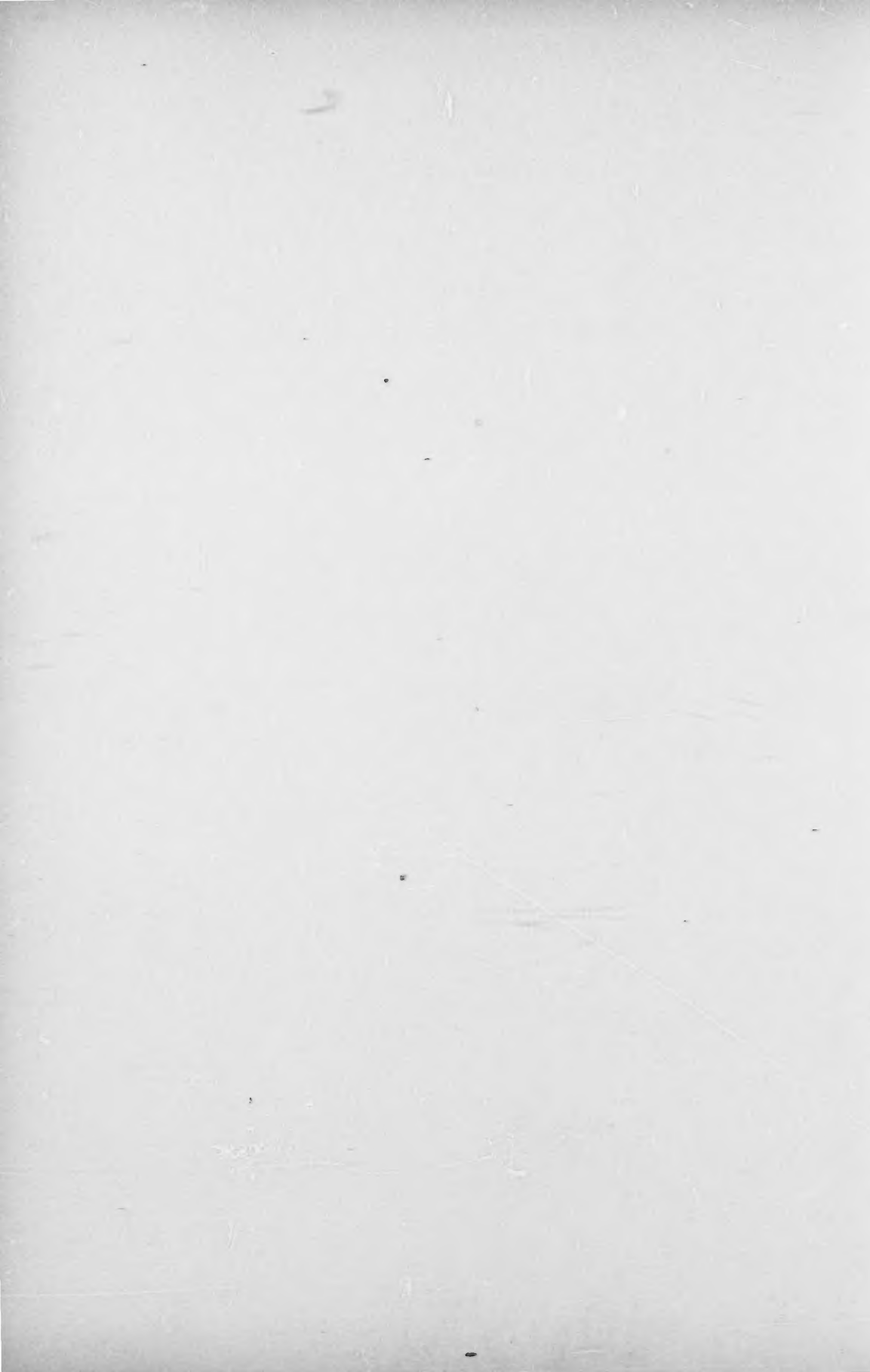


TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Reply to Ford's Brief	
I. Ford's Analysis of the Final Judgment Language In Its Opposing Brief Is Counter To Established Principles of Construction.....	1
II. In Opposing Certiorari Ford Has Again Presented Erroneous Factual Assertions That Misled The Court Of Appeals.....	3
Conclusion.....	5
Declaration of William McManus.....	1h
Attachment to Anonymous Letter to Justice Department.....	1i
Copies of the Ghosted GT reproduced by Ford in the 1970's.....	1j



TABLE OF AUTHORITIES

CASES	PAGE
<i>Atych v. Capps</i> , 449 U.S. 1312 (1981).....	2
<i>Chapman v. U.S.</i> , ___ U.S. ___ 111 S.Ct. 1919, 112 L.Ed 2d 449 (1991).....	1
<i>Fiest Publications, Inc. v. Rural Telephone Services Co., Inc.</i> ___ U.S. ___, 111 S.Ct. 1282, 113 L.Ed. 2d 358 (1991).....	1
<i>Ford v. Kammerer</i> , 450 F.2d 279, 280 (3rd Cir. 1971).....	2
<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers</i> , 415 U.S. 423 (1974).....	2
<i>Hazel-Atlas Glass Co. v. Hartford Empire Co.</i> , 322 U.S. 238 (1944).....	4
<i>Moskal v. U.S.</i> ___ U.S. ___, 111 S.Ct. 461, 112 L.Ed. 2d 449 (1990).....	1,2
<i>Schmidt v. Lessard</i> , 414 U.S. 473 (1974).....	2
<i>U.S. v. Christie Industries</i> , 465 F.2d 1002, 1007 (3rd Cir. 1972).....	2

RULES**PAGE**

*United States v. Ford Motor
Company*, 286 F. Supp. 407
(E.D. Mich. 1968) aff'd
405 U.S. 562 (1972).....2,3,4

F.R.C.P. 12(b)(6).....3

F.R.C.P. 60(b).....5

TREATISES

*Wright & Miller Federal
Practice and Procedure*
Section 2870 p. 247-8 (1973).....5

ALTRAN CORPORATION,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM IN SUPPORT

I. FORD'S NEW ARGUMENT THAT THE COURTS
SHOULD NOT CONSIDER ALL THE RELEVANT
LANGUAGE OF A LEGAL DOCUMENT
CONTRAVENES ESTABLISHED PRINCIPLES OF
CONSTRUCTION

In opposing certiorari, Ford raises a new and unwarranted argument: that the Court should not consider the provision of the Autolite Final Judgment, which directs Ford to divest "all its interest in the tradename and trademark 'AUTOLITE'..." Ford reply brief p.10-11 n 7. A longstanding rule of construction, recently emphasized by this Court, requires a Court to look to the entire document to be construed, and to construe the document to avoid ambiguity. "[A] Court should give effect, if possible, to every clause and word of a statute". *Moskal v. U.S.*, ___ U.S. ___, 111 S.Ct. 461, 112 L.Ed. 2d 449 (1990), *Chapman v. U.S.*, ___ U.S. ___, 111 S.Ct. 1919, 114 L.Ed. 2d 524 (1991), *Fiest Publications, Inc. v. Rural Telephone Services Co., Inc.* ___U.S. ___, 111 S.Ct. 1282, 113 L.Ed. 2d 358 (1991). The Third Circuit found ambiguity in the Autolite divestiture order when it failed to consider the existence or meaning of the phrase "all its interest". Instead, the court's construction effectively altered the "all" to "some", and

permitted Ford to retain some of its interest in the Autolite trademark: to-wit a portion of that trademark's good will.

Furthermore, the phrase which Ford would exclude from consideration exemplifies the very purpose of the Autolite Final Judgment. As this Court emphasized in its opinion in *United States v. Ford Motor Company*, 405 U.S. 562 (1972), the trial Court's grant of complete divestiture was required and necessary. Complete divestiture would logically include divestiture of all interest in the Autolite trademark as the Final Judgment recites, which necessarily included the Ghosted GT.

Ford supports its narrowing construction by arguing that an injunction should always be construed narrowly. It relies on *Ford v. Kammerer*, 450 F.2d 279, 280 (3rd Cir. 1971), but does not take into consideration the Third Circuit's more recent opinion in *U.S. v. Christie Industries*, 465 F.2d 1002, 1007 (3rd Cir. 1972). In *Christie*, the Third Circuit distinguished *Ford v. Kammerer*, and stated:

"The language of an injunction must be read in the light of circumstances surrounding its entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent"

U.S. v. Christie Industries better reflects the law, as stated in *Moskal* and its progeny, than does *Ford v. Kammerer* considered in isolation. Nor is Ford's position justified by the other cases it cites. In *Schmidt v. Lessard* and *Atych v. Capps*, the clause in the judgment was excessively vague. In *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, the restraining order had expired, (Ford Opposition Brief p.8).

Other cases cited by Ford consider whether to find the enjoined party in contempt. The principles used in determining contempt do not apply in the instant case. Here Ford is

affirmatively seeking to enforce a claimed property right against Altran and many others, even though it had been divested of that right and does not own it. The District Court's task was simply to determine what the judgment meant, after a full record had been developed. Instead, it misapplied the law, cut off discovery, and dismissed Altran's Complaint pursuant to Civil Rule of Procedure 12(b)(6).

The Court of Appeals acknowledged that the District Court had erred in deciding without further discovery, but went on to determine that the error was harmless. Based on an incomplete record, and misapplying the case law, it proceeded to determine the facts as if it were a District Court considering an application of contempt against Ford¹. It is this compound legal error by which Ford seeks to continue to circumvent this Court's ruling in *United States v. Ford Motor Company*.

II. IN OPPOSING CERTIORARI FORD HAS AGAIN RELIED ON ERRONEOUS FACTUAL ASSERTIONS THAT MISLED THE COURT OF APPEALS

Ford erroneously claims that its color photo copies of "original trial exhibits" "conclusively established that evidence of Ford's use of such marks was of record before the trial Court in the AUTOLITE litigation" Ford Opposition brief p.14 n.12.

Once it found the Autolite Final Judgment ambiguous, the Third Circuit relied on this representation as the lynchpin of its opinion construing the Final Judgment. The Third Circuit based its narrowing construction of the Final Judgment on Ford's representation that the Autolite Court considered the

¹ After finding the relevant language ambiguous, the Court focused on the issue of the Autolite Court's intent and knowledge of the Ghosted GT. Instead of remanding to the District Court for discovery on this question, the Appellate Court rendered its own factual determination on Judge Freeman's intent and knowledge.

Ghosted GT through this exhibit, and therefore would have specifically mentioned it in the Final Judgment if it intended to divest it (Opinion below p.21a).

The actual exhibits before the trial Court in the Autolite litigation were black and white copies, which contained a black rectangle where the Ghosted GT should have been. They were produced in the Appendix to Ford's appeal to this court of the Autolite decision (see Appendix 1f, listed as p.755a in the Appendix to the Supreme Court in the Autolite case)². Contrary to Ford's claim, if Judge Freeman had somehow taken the time to examine the single exhibit Ford relies on, he would not have seen the Ghosted GT.

The theory that Judge Freeman even saw these documents is rank speculation, which Ford states as if it were an uncontested fact. In order to rebut this speculation Altran respectfully submits the declaration of William McManus, the chief counsel for the Government in *United States v. Ford Motor Company*, who testifies as to his independent recollection regarding this alleged exhibit. (Appendix 1h) Thus, the Third Circuit's ruling on Altran's counterclaim was premised on Ford's apparent fraud on the Court.³

Ford's strategy of concealment is consistent. As the Third Circuit noted, in the Bendix agreement where Ford was obligated to reproduce the Ghosted GT, "there is no doubt that

² Ford erroneously claims that Altran cannot now challenge the authenticity of this evidence, because it did not do so below. However, the Supreme Court Appendix was not even of record in the trial Court, which had cut off further development of such relevant factual issues.

³ The power to vacate a ruling which has been obtained by fraud on the Court is inherent in all Courts, see F.R.C.P. 60(b) and advisory note; Wright and Miller, *Federal Practice and Procedure* Section 2870 p. 247-8 (1973). This power has been long used by the Supreme Court when a plaintiff has perpetrated a fraud on an Appellate Court, *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944).

the GT was blacked out . . .", (Opinion below p.26). In the same agreement where Ford was obligated to list the Ghosted GT in two places that the District Court and the Justice Department relied on, it was omitted⁴ (see Appendix 1h paragraph 6). Before the District Court in this case, Ford argued that the Justice Department was aware of the Ghosted GT through an anonymous letter it received about the case. However, in that letter the Ghosted GT was blacked-out (Appendix 1i). Similarly, in its submissions to this Court in the Autolite appeal, Ford presented an exhibit which contained a blacked out Ghosted GT⁵.

CONCLUSION

This Court should grant the petition for certiorari and reverse the Court of Appeals judgment, for the reasons outlined in Altran's petition and to prevent Ford from benefiting from its fraud.

⁴ See Bendix Agreement, Appendix 11e, 12f. The Appellate Court did not comment on this evidence. However, as aforementioned, the Court was under the mistaken belief that the exhibits Ford submitted to it were representative of what the Autolite trial court saw.

⁵ In its Opposition to the Petition for Certiorari, Ford for the first time argues that the state of technology in the 1970's is the cause of the repeated blacking out (Ford Opposition Brief p.14-15 n.12). First, Ford itself reproduced clear copies of the Ghosted GT in the early '70's (for examples see Appendix 1j, A - Copyright registration 1967, B - Photocopy of spark plug box - copied by Ford in early '70's, C - Autolite catalog page from early '70's). Technical limitations cannot account for the solid white rectangle that covers the GT in the Bendix agreement. Finally, no technology was involved in listing copyrights and trademark additions in the Bendix agreements, where Ford listed every other such trademark addition as required, but omitted the Ghosted GT.

Respectfully submitted,

John J. Gibbons,
CRUMMY, DEL DEO,
DOLAN, GRIFFINGER &
VECCHIONE
1 Riverfront Plaza
Newark, New Jersey 07102

Theodore V. Wells, Jr.
David L. Harris
LOWENSTEIN, SANDLER,
KOHL, FISHER & BOYLAN
A Professional Corporation
65 Livingston Avenue
Roseland, New Jersey 07068

Jonathan M. Hyman
27 Fairfield Street
Montclair, New Jersey 07042

Attorneys for Petitioner
Altran Corp.

Stephen E. Feldman
Kenneth Feldman
Of Counsel

APPENDIX

WILLIAM McMANUS declares as follows:

1. I was the lead litigating attorney for the U.S. Government in *United States v. Ford Motor Company*.

2. After the decision in 1968 the District Court instructed the parties to meet and prepare an order embodying the Court's decision. The Justice Department's position was that the proper remedy was complete divestiture, whereas, Ford wanted to keep the Autolite trademark, the principal asset in the acquisition.

3. After failing to reach agreement the District Court held hearings in January 1970 to determine the relief. The principal issue was whether there was going to be complete divestiture. During those hearings there were numerous witnesses, and exhibits. They were all directed to the question of whether the Autolite assets were to be divested. Ford argued very strongly to keep the AUTOLITE trademark. The Appellate Court has recently stated that the additions to the Autolite trademark were material at the relief hearings. (Opinion p.21) That is incorrect, they were not in issue at the relief hearings. The significance and very existence of the Ghosted GT were not realized by the District Court or the U.S. Government at those hearings.

4. The Appellate Court has apparently focused on a few of the exhibits claimed to have been submitted at those hearings. These exhibits were attached to an affidavit of a Ford lawyer (Exhibit C Opinion p. 21). I have examined these exhibits. The Appellate Court has stated that these exhibits showed vivid pictures of the Ghosted GT, and therefore the District Court must have known of the Ghosted GT. Evidently, the court believed this because the copies recently submitted by Ford were clear color copies. However, to the best of my recollection, the exhibits before the District Court were black and white copies with a black rectangle below the word Autolite

where it now appears the GT should have been.

5. The Appellate Court believed that the black rectangle showed the Ghosted GT. That is in error. A copy of one of those exhibits in the same original condition, as shown to Judge Freeman, is included in the Appendix to the Supreme Court in *U.S. v. Ford* page 755a Exhibit FR-9B. As can be readily seen a black rectangle is present below AUTOLITE, and not a vivid color Ghosted GT design. [When the Appendix was submitted to the Supreme Court the exhibits were checked to make sure they were identical to those used in District Court. If a color exhibit showing the Ghosted GT were used in District Court, a notation would have been made on the copy in the Supreme Court Appendix that it was not the same. No such notation exists.]

6. Ford chose Bendix to be the acquiree of the assets, and forwarded the divestiture agreements to us for approval. I made sure that Ford listed all assets, including trademarks being divested and being retained (Appendix 11e, 12e). Both the Court and the Justice Department relied on those lists. I have learned that the Ghosted GT was omitted from the lists. The Court and I therefore relied on erroneous lists.

7. The above is my opinion and not that of the United States Department of Justice. The above, in my opinion constitutes public information, and does not disclose any confidential or privileged information of the Justice Department.

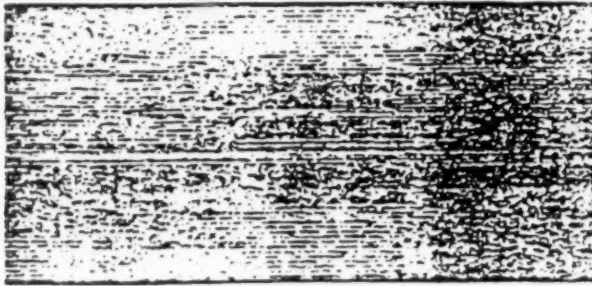
8. I declare that the foregoing is true to the best of my information and belief, and that willful false statements or the like will subject me to punishment.

William McManus

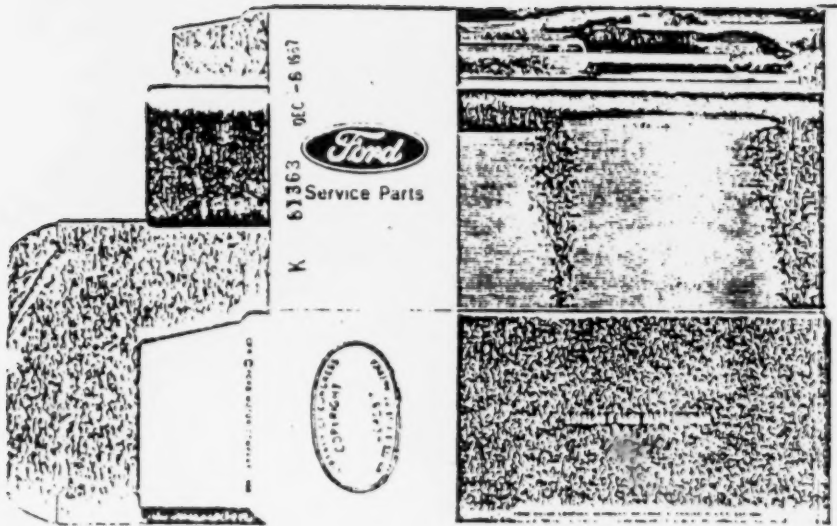
See what's new from Ford Marketing
Corporation! Please lift here.



Autolite



A



B



C

Autolite

Size	Type - 1/2	Type - 3/4
SALEBURY	1/2 1/2	3/4 3/4
SCOTT	1/2 1/2	3/4 3/4
SEBASTIAN	1/2 1/2	3/4 3/4
ROY	1/2 1/2	3/4 3/4
...

